Billing Code 4910-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2009-0017 (PD-34(R))]

COMMON LAW TORT CLAIMS CONCERNING DESIGN AND MARKING OF DOT SPECIFICATION 39 COMPRESSED GAS CYLINDERS

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

APPLICABLE FEDERAL REQUIREMENTS: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

MODES AFFECTED: All transportation modes

SUMMARY: Federal hazardous material transportation law preempts a private cause of action which seeks to create or establish a State common law requirement applicable to the design, manufacture, or marking of a packaging, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce when that State common law requirement would not be substantively the same as the requirements in the HMR. Federal hazardous material transportation law does not preempt a tort claim that a packaging, container, or packaging component that is represented,

marked, certified, or sold as qualified for use in transporting hazardous material failed to meet the design, manufacturing, or marking requirements in the HMR or that a person who offered a hazardous material for transportation in commerce or transported a hazardous material in commerce failed to comply with applicable requirements in the HMR.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001 (Tel. No. 202-366-4400).

SUPPLEMENTARY INFORMATION

I. Application

AMTROL, Inc. has applied to PHMSA for an administrative determination whether the Federal hazardous materials transportation law[1] preempts State common law tort claims that the manufacturer of a DOT specification 39 compressed gas cylinder should have designed the cylinder to resist rusting and/or marked or labeled the cylinder with warnings of the potential hazard of rusting over time.

A DOT specification 39 cylinder is a non-reusable (non-refillable) seamless, welded, or brazed cylinder made of steel or aluminum (having certain specified characteristics), with size limitations (depending on the service pressure of the cylinder) and requirements for manufacturing, minimum thickness of the cylinder wall, openings and attachments on the head of the cylinder, and pressure and flattening testing. 49 CFR 178.65. Subsection

[1] The Federal hazardous material transportation law currently codified at 49 U.S.C. 5101 *et seq.* is often referred to by the acronym "HMTA" for the Hazardous Materials Transportation Act, Pub. L. 93-633, 88 Stat. 2156, enacted January 3, 1975. Prior to codification in 1994 (Pub. L. 103-272, 108 Stat. 745 (July 5, 1994)), the HMTA was set forth at 49 App. U.S.C.A. 1801 *et seq.*

178.65(i) provides that the cylinder must be marked with certain information[2] including the specification number, service and test pressure, date of manufacture and a registration number identifying the manufacturer, and:

--"NRC" for "non-reusable container," and

--the statement that "Federal law forbids transportation if refilled" plus a statement of the maximum civil and criminal penalties applicable at the date of manufacture.

On January 30, 2009, PHMSA published a notice in the Federal Register inviting interested persons to comment on AMTROL's application. 74 FR 5723. As discussed in this notice, a products liability lawsuit had been brought against AMTROL and other defendants by the survivors and next of kin of Kenneth Elder (the "Elders") who died on January 24, 2003, when a rusted DOT specification 39 cylinder ruptured after Mr. Elder placed the cylinder in 179 degree water.[3]

In response to AMTROL's application and the January 30, 2009 Federal Register notice, comments were submitted by AMTROL, the Elders, Thomas Wilson (a retired hazmat shipper who occasionally acts as a consultant), and the Gases and Welding Distributors Association, Inc. (GAWDA).[4]

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[2] In this determination, the word "marking" is used to refer to the information required to be marked on a DOT specification 39 cylinder under 49 CFR 178.65(i) – to distinguish this marking from a hazard class warning label (*e.g.*, NONFLAMMABLE GAS) and a product sticker or label that may contain the proper shipping name and UN identification number required to be marked on the filled cylinder by a person who offers the filled cylinder for transportation in commerce. *See* 49 CFR 172.301 *et seq.* and 172.400 *et seq.*

[3] The Elders' claims against AMTROL are presently pending as a claim in bankruptcy in the U.S. Court of Appeals for the Third Circuit which has issued a stay pending PHMSA's determination. *In re Amtrol Holdings, Inc. v. Kenneth Elder*, No. 10-3273.

[4] GAWDA describes itself as "a national trade association representing the interests of some 600 distributors of compressed and cryogenic gases and related supplies and equipment in the United States and Canada," some of which "fill, store, handle and transport gases in DOT-39 compressed gas cylinders."

II. Federal Preemption

A United States Court of Appeals has found that uniformity was the "linchpin" in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). Section 5125 of Title 49 U.S.C. contains express preemption provisions. As amended by Section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107-296, 116 Stat. 2320),[5] § 5125(a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted – unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under § 5125(e) – if

> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
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> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.[6]

Subsection (b)(1) of 49 U.S.C. 5125 further provides that a non-Federal requirement concerning any of the following subjects is preempted – unless authorized by another Federal law or DOT grants a waiver of preemption – when the non-Federal requirement is not "substantively the same as" a provision of Federal hazardous material transportation law, a

[5] Section 1711 of the Homeland Security Act of 2002 added the words "including security" to the applicability provisions in 49 U.S.C. 5103(b)(1) and the preemption provisions in § 5125(a) and (b)(1). Otherwise, the 1994 codification of Title 49 and subsequent editorial revisions and technical corrections have not made any substantive changes to these provisions since amendment of the original HMTA in 1990. *See* Sec. 7122(a) of the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, which is Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1891 (Aug. 10, 2005), and Pub. L. 110-244 § 302(b), 122 Stat. 1618 (June 6, 2008).

[6] These two paragraphs set forth the "dual compliance" and "obstacle" criteria which are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc*. v. *Paul*, 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security:[7]

> (A) the designation, description, and classification of hazardous material.
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> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
>
> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
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> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.
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> (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material.

The Supreme Court has found "that common-law causes of action for negligence and strict liability do impose 'requirement[s]'" that may be subject to preemption by Federal laws. *Riegel* v. *Medtronic*, 552 U.S. 312, 323, 128 S.Ct. 999, 1007 (2008). The Supreme Court has also specifically recognized the authority in 49 U.S.C. 5125 for DOT "to decide whether a state or local statute that conflicts with the regulation of hazardous [materials] transportation is pre-empted." *Wyeth* v. *Levine*, 555 U.S. 555, 129 S.Ct. 1187, 1201 n.9 (2009).

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the

[7] To be "substantively the same," the non-Federal requirement must conform "in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d). Additional standards apply to preemption of non-Federal requirements on highway routes over which hazardous materials may or may not be transported and fees related to transporting hazardous material. *See* 49 U.S.C. 5125(c) and (f).

requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.53(b).

Section 5125(d)(1) requires notice of an application for a preemption determination to be published in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. *See* 49 CFR 107.209(c).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is "fair" within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy "that preemption of State law

by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations and which PHMSA applies in making administrative preemption determinations.

III. Discussion

A. Summary of Comments

AMTROL asserts that the Elders' common law tort claims are preempted because they could create design, manufacturing, and marking and labeling requirements for DOT specification cylinders that are not substantively the same as the requirements in 49 CFR 178.65. In its original application, it stated that "[a]pplication of the state court requirement would undercut" the "need for national uniformity" in requirements for the packaging of hazardous materials, as discussed in PHMSA's determinations in Inconsistency Rulings Nos. 7-15, 49 FR 36632, 36633 (Nov. 22, 1984). AMTROL also stated that, "as presented by the [Elders'] common law claims, the only issue has to do with requirements for labeling and design of a specification 39 cylinder" which "are not 'substantively the same' as the requirements" in the HMR and, "[c]onsequently, such 'requirements' are preempted."

The Elders frame the issue in terms of whether the design, manufacturing, and marking requirements for a DOT specification 39 cylinder apply to a cylinder that was being "used." The Elders acknowledge "that the cylinder in question, as designed and manufactured, complies with all of the specifications set forth in 49 CFR 178.65 . . . and complies with all the labels and warnings required by the DOT specification." However,

they assert that "warnings should be utilized to protect the end user," because "the manufacturer knew or should have known that the cylinders could rust."[8]

The Elders stated that the technician was not using the cylinder in a transportation mode; he was simply using the cylinder as an end-user on the job after its journey had ended." Accordingly, they assert that "a State common law requirement that the products being used on the job be safe for their intended use does not interfere with the DOT regulation. The state common law does not seek to impose its requirement where the cylinder in question clearly, at the time of its manufacture and transportation, complied with the DOT specifications."[9]

Mr. Wilson stated that "the common law tort claim appears to be about design and labeling of the compressed gas cylinder as it relates to consumer use – not as it relates to use of the cylinder in transporting hazardous materials in commerce." However, he also noted "that end-users may re-transport hazmat during their daily routine," acknowledging implicitly that the HMR applied to Mr. Elder's transportation of the cylinder from his shop to his customer's location.

According to GAWDA, the critical inquiry is "whether Congress intended to preempt certain specific types of claims," and an "[a]nalysis of this question must begin, as the Supreme Court has stated, with determining Congressional intent" (citing *Altria Group, Inc.* v. *Good*, 129 S.Ct. 398, 543 (2008)). It rejected the Elders' position that State requirements covering "end use" are not preempted by 49 U.S.C. 5125 and stated:

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[8] The Elders provided three samples of "warnings utilized in the past by manufacturers [that] state: 'overheating, pressurizing, or rusting can cause cylinder to burst, resulting in serious personal injury or death.'"

[9] The Elders also cited and quoted from cases which they contend "are applicable" or "nearly on all fours with the present case." However, some of these cases appear to have involved an injury from a hazardous material that was not packaged or handled in complete compliance with requirements in the HMR. In other cases, the hazardous material was a consumer item purchased for personal use and subject to regulations of the Consumer Product Safety Commission.

> Clearly, it is immaterial whether the cylinder in question was at its final destination or how long it had been there, if it was marked indicating it was a DOT-39 cylinder; it was by definition subject to DOT regulation. Therefore, any state requirements of additional manufacturing specifications or packaging warnings must affect the "transportation" of the cylinder and are, therefore, preempted by HMTA.

B. Analysis

Federal hazardous material transportation law explicitly provides that the HMR apply to the design, manufacture, and marking of packagings (such as cylinders) that are "represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce." 49 U.S.C. 5103(b)(1)(A)(iii), (b)(1)(E). In its October 30, 2003 final rule, on the "Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage," PHMSA explained that "[p]ackaging integrity is critical to safe transportation of hazardous materials, and

> uniformity of packaging requirements assures the safe and efficient movement of hazardous materials across state lines and international boundaries. Thus, consistent with the preemption provisions of Federal hazmat law, the Secretary's regulatory jurisdiction in this area must preempt state and local law.

68 FR 61906, 61908. PHMSA continued by explaining that "because a packaging that is used for storage one day may be used for transportation the next, it is critical to transportation safety that packagings represented as meeting DOT or UN specifications in fact do so." *Id.* Accordingly, "[i]f a packaging shows evidence that its effectiveness as a container may be substantially reduced or if the packaging has been subjected to conditions or operating practices that could reduce its effectiveness, it must be inspected and repaired, in

accordance with applicable requirements, before it can be filled and offered for transportation. *Id.*[10]

In this final rule, PHMSA relocated to 49 CFR 171.2(g) and revised without making any substantive change to the wording of former § 171.2(c) (Oct. 1, 2003 ed.) to read:

> No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter governing its use in the transportation of a hazardous material in commerce unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of this subchapter. . . . The requirements of this paragraph apply whether or not the packaging or container is used or to be used for the transportation of a hazardous material.

These provisions in the HMR and the "substantively the same as" preemption standard added to the law in 1990 carry out the finding of the House of Representatives Committee on Energy and Commerce that there is "a compelling need for standardized requirements relating to certain areas of the transportation of hazardous materials. Conflicting Federal, State and local requirements pose potentially serious threats to the safe transportation of hazardous materials." H. Rept. 101-444, part 1, pp 33-34 (Apr. 3, 1990). In particular, "[u]niform requirements for designing, manufacturing, and testing such containers and packages will enhance the safe transportation of hazardous materials by allowing for ease of identification, familiarity with characteristics of packages and containers and consistency in systems designed to handle such hazardous materials." *Id.* at 35.

It is not necessary to determine whether the DOT specification 39 cylinder was in "transportation" when it failed, because the HMR applied to AMTROL when it designed, manufactured, and marked the cylinder "as qualified for use in transporting hazardous material in commerce." 49 U.S.C. 5103(b)(1)(A)(iii). The Elders' contention that the

[10] *See, e.g.,* 49 CFR 173.301(a)(2): "A cylinder that has a crack or leak, is bulged, has a defective valve or a leaking or defective pressure relief device, or bears evidence of physical abuse, fire or heat damage, or detrimental rusting or corrosion, may not be filled and offered for transportation."

design, manufacture, and marking requirements in 49 CFR 178.65 do not "cover [Mr. Elder's] use of the cylinder" is beside the point, as is its position that the "use" to which the cylinder might be put is "outside the purview" of that section of the HMR. Rather, the "substantively the same as" preemption provision in 49 U.S.C. 5125(b)(1)(E) must govern the "adequacy of the cylinder" at all times that it is "represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce," and not just the period in time "when it was used to transport hazardous material," as the Elders contend.

The U.S. Court of Appeals for the Third Circuit reached the same conclusion in *Roth* v. *Norfalco LLC*, 651 F.3d 367, 379-80 (2011). In this case, the Court affirmed a summary judgment in favor of the manufacturer of a rail tank car from which sulfuric acid had sprayed when the tank car was being unloaded by an employee of the consignee of the shipment and stated:

> Here, the statute and its applicability could not be more clear. Roth seeks to impose a tank car design requirement. Section 5125(b)(1) expressly preempts any common law requirement "about" the design of a "package, container, or packaging component . . . qualified for use in transporting hazardous materials in commerce." . . . It is irrelevant what Roth was doing at the precise moment of his injury. . . . The tank car is, at all times, a container qualified for use in transporting hazardous materials. The proposed design requirement is expressly preempted.

It should be noted that the preemption provision in 49 U.S.C. 5125(b)(1)(E) would not insulate a person who improperly, and in violation of the HMR, offers or transports a hazardous material in a packaging "that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce." Nor would there be preemption of

a common law tort action for damages when the packaging does not, in fact, meet the applicable design and manufacturing specification in the HMR.[11]

Under the plain language of the Federal hazardous material transportation law, requirements in the HMR govern the design, manufacture, and marking of "a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce." 49 U.S.C. 5103(b)(1)(A)(iii), 49 CFR 171.1(a). Any State requirement, including a State's common law, on the "designing, manufacturing, [or] marking . . . a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce" is preempted unless it is "substantively the same as" the requirements in the HMR. 49 U.S.C. 5125(b)(1)(E). The Elders have not pointed to, and PHMSA is not aware of, any other Federal law that would authorize the common law tort claims asserted by the Elders that the manufacturer of a DOT specification 39 compressed gas cylinder should have designed the cylinder (or any component thereof) in a different manner than – or marked or labeled the cylinder with any information beyond that required by – 49 CFR 178.65.

IV. Ruling

Federal hazardous material transportation law preempts a private cause of action which seeks to create or establish a State common law requirement applicable to the design, manufacture, or marking of a packaging, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce when that State common law requirement would not be substantively the same

[11] Moreover, the Consumer Product Safety Commission (CPSC) has the authority to require "that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions." 15 U.S.C. 2056(a).

as the requirements in the HMR. Federal hazardous material transportation law does not preempt tort claims that the packaging or packaging component failed to meet the design, manufacturing, or marking requirements in the HMR or that a person who offered a hazardous material for transportation in commerce or transported a hazardous material in commerce failed to comply with applicable requirements in the HMR.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the Federal Register. A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

This decision will become PHMSA's final decision 20 days after publication in the Federal Register if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).

If a petition for reconsideration is filed within 20 days of publication in the Federal Register, the action by PHMSA's Chief Counsel on the petition for reconsideration will be PHMSA's final action. 49 CFR 107.211(d).

Issued in Washington, DC on June 26, 2012.

/s/_____
Vanessa L. Allen Sutherland
Chief Counsel

[FR Doc. 2012-16240 Filed 07/02/2012 at 8:45 am; Publication Date: 07/03/2012]